

2007 WL 7304330 (La. Dist. Ct.) (Trial Motion, Memorandum and Affidavit)

District Court of Louisiana.

26th Judicial District

Bossier Parish

John C. SKANNAL,

v.

Dennis BAMBURG, et al.

No. 116576C.

March 20, 2007.

Plaintiff's Response to Defendants' Motion for Daubert-Foret Hearing

Jones, Odom, Davis & Politz, L.L.P., [John S. Odom, Jr.](#), #10163, [Marshall Jones, Jr.](#), #7488, 2124 Fairfield Avenue, Shreveport, Louisiana 71104, 318-221-1600, fax 318-425-1256, john.odom@jodplaw.com, marshall.jones@jodplaw.com, Attorneys for Petitioner, John Barron, Skannal, as Testamentary Executor of the Succession of [John C. Skannal](#).

MAY IT PLEASE THE COURT:

I.

BACKGROUND OF THE MOTION

Without stating a basis for the challenge, Defendants have filed a Motion *in Limine* seeking to exclude the testimony of four expert medical witnesses the Plaintiff has identified who will be called to testify concerning the mental competence of John C. Skannal and whether or not he was the victim of undue influence by the Defendants at various times pertinent to the lawsuit. The Court has ordered a hearing on March 26, 2007 at which Plaintiff will present the testimony of the medical experts it intends to offer at trial to enable the Court to perform the “gatekeeper” function contemplated by *State v. Foret*, 628 So. 2d 1123 (La. 1993), applying the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Defendants have conceded in their motion that Drs. Paul Ware, George Seiden, Richard Williams and David Henry all possess the requisite expert qualifications to be accepted as expert witnesses by this Court in the fields of psychiatry, forensic psychiatry, addictive medicine and geriatrics and family medicine. Defendants' motion challenged only the methodology utilized by each of these expert medical witnesses.

II.

APPLICABLE LAW AND ARGUMENT

A. [Louisiana Code of Evidence article 702](#) controls this motion.

By this point in the proceedings, it should be clear to the Court that the Plaintiffs intend to present a case based heavily on medical expert testimony from psychiatrists, addictive disease specialists, geriatric medicine specialists and clinical psychologists to establish that John C. Skannal lacked mental capacity or was unduly influenced by the Defendants on various dates when the challenged transactions took place between him and the Defendants. The Defendants apparently intend to offer anecdotal evidence that Mr. Skannal was transacting other business during some of the same time periods, presumably in an effort to show that since he was “doing business” he must have understood what he was doing.

Plaintiffs will point out through the testimony of expert medical witnesses that “doing business” (that is, for example, by signing documents) is not the same thing as comprehending the importance and consequences of what a person is signing. Therefore, mere observations that someone bought a commodity or signed an instrument, without significantly more inquiry into whether or not the person could actually read and comprehend the document and whether or not they understood the ramifications of what they were doing, are of very little value in determining whether or not the person was competent at the time of a transaction. A much deeper inquiry and investigation is required.

The question before the Court in the Defendants' Motion *in Limine* is whether or not the testimony of the Plaintiff's medical expert witnesses is sufficiently reliable to be admitted. Plaintiffs submit that it is and that the methodology utilized by these experts has been peer-reviewed, validated, and most importantly, accepted in Louisiana courts, including the Second Circuit Court of Appeal.

The basis for expert testimony is found in [Louisiana Code of Evidence article 702](#):

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

According to the most recent pronouncement by Second Circuit Court of Appeal on the subject of expert testimony in cases involving lack of capacity and undue influence:

“The admission of expert testimony is proper when the following three factors are established: (1) the expert is qualified to testify competently regarding the matters he intends to address, (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in [Daubert \[v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 \(1993\)\]](#), and (3) the testimony assists the trier of fact through the application of scientific, technical, or specialized expertise. [Chears v. State DOTD, 03-0680 \(La. 12/3/03\), 861 So. 2d 536.](#)”

[In re Succession of Pardue, 40,177 \(La. App. 2d Cir. 11/8/05\), 915 So. 2d 415, 420, writ denied 2006-C-0125 \(La. 4/28/06\), 927 So. 2d 284.](#)

B. Psychological autopsies are recognized and accepted by Louisiana courts, although the Plaintiff's medical experts did much more than psychological autopsies in this case.

In the *Pardue* case, testimony was admitted by the trial court from three of the same witnesses who are scheduled to testify on behalf of the Plaintiff in this case (Drs. Ware, Seiden and Henry). Dr. Ware's testimony was the subject of an unsuccessful *Daubert* challenge. None of the physicians in *Pardue* - unlike all of the Plaintiff's experts in this case - had examined Jo Pardue during her life. Each of them performed a procedure known as a “psychological autopsy” to reach their various opinions. Dr. Ware testified in *Pardue* that the psychological autopsy process has been described and validated in a number of peer-reviewed psychiatric journals and was generally accepted in the psychiatric field. The trial judge denied the *Daubert* challenge against Dr. Ware and he was allowed to testify and state his opinion. The Second Circuit affirmed the trial judge's decision and ruled that Caddo District Judge Crichton had not **abused** his discretion in allowing testimony that utilized a methodology that was generally accepted in the psychiatric community.

The testimony of the Plaintiff's experts in this case will be that they did much *more* in their investigation of John C. Skannal and his medical and mental condition than was possible in the psychological autopsies performed in the *Pardue* case. Unlike the case of Jo Pardue (which involved a challenge of a last will and testament on the basis of allegations of undue influence) in

which the testatrix was deceased before any experts were retained, the experts for the Plaintiff in this case had the opportunity to actually examine John C. Skannal during his lifetime, had the benefit of extensive empirical psychological tests conducted on Mr. Skannal in August and September 2003, had access to family, friends, treating physicians and care givers for interviews and more medical records available for their review (over 8,000 pages) than they had ever had in any other previous case.

If this Court determines that the methodology utilized by the Plaintiffs expert medical witnesses amounted to an “expanded psychological autopsy”, their testimony should be admitted because that process has been widely accepted in the courts of both Louisiana and other states. *See, e.g., Bethley v. Keller Construction et al*, 2001-1085 (La. App. 1st Cir. 12/20/02), 836 So. 2d 397. In *Bethley*, a worker's compensation case in which an injured workman had committed suicide while receiving compensation benefits, the administrative law judge for the Office of Worker's Compensation Administration refused to allow psychological autopsy testimony to establish that the claimant's suicide was *caused* by a specific work-related accident. The judge's observations about psychological autopsies in other types of cases, however, is directly on point in this case. The First Circuit Court of Appeal wrote:

“After considering the evidence presented in support of and in opposition to MAPP's motion to exclude the testimony of Dr. Davis, the judge found that the psychological autopsy has been subjected to peer review and publication. Furthermore, it was found to be generally accepted in the scientific community with evidence of what the potential rate of error is in conducting these autopsies. However, he observed that the ability to test the expert's theory or technique is problematic, in that the subject of the theory or technique is deceased. Nonetheless, the judge noted that the technique might still pass the *Daubert* test, depending on the level of reliability of Dr. Davis's testimony.

“Relative to the level of reliability of the expert testimony sought to be introduced, the judge observed that a psychological autopsy is relatively reliable to show whether a person had a mental or substance **abuse** disorder or whether an incident was a suicide or a homicide. However, the judge questioned the reliability of a psychological autopsy to prove that a suicide was caused by a specific work-related accident. He remarked that the psychological autopsy is unreliable in revealing the cause of a mental disorder and why a person decided to take his or her own life at a given point in time, which was the issue Ms. Bethley sought to use Dr. Davis's testimony to prove. Accordingly, the judge concluded that the *Daubert/Kumho* requirements for admissibility of an expert's opinion were not satisfied in this case.

“A trial judge has broad discretion in determining whether *Daubert's* specific factors are reasonable measures of reliability in a particular case. Ultimately, the trial judge's decision to admit or exclude expert testimony is subject to the **abuse** of discretion standard of review. *Kuhmo*, 119 S. Ct. At 1176. After considering the evidence presented to the judge concerning MAPP's motion to exclude the testimony of Dr. Davis, we are not convinced that the judge **abused** his discretion in ruling on the admissibility of such testimony under the facts of this case. We recognize that there are cases in this state that have been resolved after consideration was given to expert testimony concerning a psychological autopsy; however, the psychological autopsies in those cases were used to prove something other than the reason the decedent committed suicide, for example, whether there was undue influence over the testator by a legatee in the making of a will or whether a death was a homicide or a suicide for purposes of determining coverage under a life insurance policy. *See Succession of Reeves*, 97-20 (La. APP. 3rd Cir. 10/29/97), 704 So. 2d 252, writ granted, 98-0581 (La. 5/1/98), 805 So. 2d 185 [footnote omitted]; *Brown v. Hartford Life Companies*, 593 So. 2d 1376 (La. App. 5th Cir. 1992).”

836 So. 2d at 402-03.¹ The importance of *Bethley* to this Court is its recognition that psychological autopsies are reliable in determining whether there was undue influence over a party in making a will, for example (a closely analogous situation to this case) or whether or not a person had a mental or substance **abuse** disorder - the precise questions involved in Plaintiff's challenge of certain transactions between John Skannal and the Bamburges.²

Plaintiffs submit that if *Bethley* and other Louisiana cases stand for the proposition that in cases such as this one psychological autopsies can be relied upon to provide useful evidence to aid the trier of fact, the process utilized by the Plaintiffs medical experts - which went significantly further than a psychological autopsy - should be considered reliable and admissible.

B. Defendants' motion does not state a specific challenge to the methodology utilized by Plaintiff's medical expert witnesses. Plaintiff's expert medical witnesses conducted forensic psychiatric and medical evaluations of John C. Skannal in the same manner that has been allowed in Louisiana courts for many years.

The Defendants' motion does not outline the methodology utilized by the Plaintiff's expert medical witnesses, nor does it state a specific challenge to any particular type of methodology. Indeed, all the motion basically says is "We don't know what your methodology was, but we're sure it was not sufficiently reliable for the Court to accept and therefore we want the opinions of all the Plaintiff's expert witnesses excluded." With all respect, that type of unfocused challenge should carry with it almost no weight at all. Once the Plaintiff's expert medical witnesses have testified at the *Daubert* hearing, this Court will understand completely that their methodology was time-honored, the methodology they utilized has been accepted in Louisiana courts for decades and that their opinions will greatly aid the Court in understanding the evidence and determining facts in issue.

The testimony of the witnesses Plaintiff will present on March 26, 2007 will show that no new, untested or unique methodology was utilized by any of Plaintiff's expert witnesses in diagnosing John C. Skannal's medical and mental condition. The methodology each of the witnesses utilized was to conduct a forensic psychiatric examination and evaluation (in the case of Drs. Ware, Seiden and Williams) and a forensic medical examination and evaluation (in the case of Dr. Henry) of John C. Skannal and to reach certain conclusions based on widely-accepted methods of medical diagnosis and analysis that have been universally recognized in medical science since the time of Hippocrates.

The conclusions the Plaintiff's expert medical witnesses reached consisted of diagnoses that are recognized both by generally accepted medical science (in the case of Dr. Henry's conclusions) or were psychiatric diagnoses accepted in the Diagnostic and Statistical Manual of Mental Disorders - IV("DSM-IV"), the universally recognized authoritative reference work on psychiatry and psychiatric conditions and disorders.

The psychiatrists for the Plaintiff who examined John C. Skannal³ diagnosed him as having various psychiatric and medical conditions, including three types of [dementia](#): vascular, Alzheimer's and alcohol dependence, in addition to a variety of other medical problems, all of which would have an adverse impact on his cognitive abilities. They will opine at trial about how those [dementias](#) and the other medical conditions suffered by Mr. Skannal affected his cognitive functions in various ways at various times in the past and how his condition made him uniquely susceptible to undue influence from the Defendants. Their diagnoses were all made using standard forensic psychiatric or medical diagnostic procedures and all of the Axis I diagnoses (the psychiatric conditions noted by Drs. Ware, Seiden and Williams) have been peer-reviewed and extensively tested for reliability and validity prior to being accepted as diagnoses in the DSM-IV. Additionally, each of the psychiatrists interviewed numerous family members, other individuals who had known Mr. Skannal for many years and health care providers (including the manager and principal attendant at The Arbor, the assisted living facility where Mr. Skannal went in February 2004, immediately prior to executing many of the challenged documents, and Dr. Keith Kessel, the treating geriatric psychiatrist of Mr. Skannal who recommended in October 2003 that he be interdicted).

Dr. David Henry, the geriatrician who examined Mr. Skannal, reached the same diagnoses as the psychiatrists (as to the three forms of [dementia](#) from which Mr. Skannal suffered), as well as medical conclusions concerning the other conditions from which Mr. Skannal was suffering and the effect those conditions would have had on his cognitive function and his susceptibility to undue influence at earlier times. Dr. Henry's principal practice is with [elderly](#) patients and he is uniquely qualified to render his expert opinion regarding cognition in the impaired [elderly](#) (including those with [Alzheimer's disease](#) and who are habitual and chronic alcoholics, both of which conditions describe Mr. Skannal). As with the psychiatrists, Dr. Henry's medical process was absolutely nothing new or unique: he assessed the patient, formulated a differential diagnosis list that placed the most likely and significant diagnoses at the top and then formulated his medical opinion based on all the available facts at hand. Prior to reaching any of his conclusions, Dr. Henry also interviewed numerous family members, friends and acquaintances of John Skannal and the two workers from The Arbor.

In addition to the foregoing, all of the Plaintiff's expert medical witnesses met together for joint consultations on September 9, 2005, November 22, 2005, January 24, 2006, March 14, 2006 and February 27, 2007. Each of those conferences lasted approximately two to two and a half hours. During those conferences, the experts discussed their interview results, cross-fed notes on interviews that had been conducted for the benefit of all of the medical expert witnesses and reviewed the various conclusions that each had independently reached concerning Mr. Skannal's medical and psychiatric conditions and how those may have affected his cognitive abilities and his susceptibility to undue influence at earlier times. Additionally, during the conference on March 14, 2006, all of the Plaintiff's expert medical witnesses met with Dr. Ron Goebel, who interpreted for them the results of the psychological testing that had been done on Mr. Skannal on August 23 and September 4, 2003 while he was hospitalized at Life Care Hospital in Shreveport.

The extensive review of medical records of Mr. Skannal, the review of psychological testing data, the interviews with family members, friends and health care providers for Mr. Skannal and the examinations of Mr. Skannal by each of the Plaintiffs expert medical witnesses establishes the foundation for their opinion testimony and this Court may place great reliance on the thoroughness of their evaluations and opinions.

C. The Plaintiff's medical experts essentially performed the same tasks as they have done in numerous sanity commissions pursuant to [Louisiana Code of Criminal Procedure article 650](#).

The psychiatrists who will testify on behalf of the Plaintiff have each been appointed by various courts over the years to serve on numerous sanity commissions. [Article 650 of the Louisiana Code of Criminal Procedure](#) provides that when a defendant enters a plea of “not guilty and not guilty by reason of insanity”, the court may appoint a sanity commission consisting of at least two and not more than three licensed physicians who have experience in conducting forensic evaluations. The members of the sanity commission thereafter examine the defendant and review such addition materials and medical records as may be available and then *report to the Court concerning the defendant's mental condition at the time of the offense* - which is obviously going to be a time earlier than the time when they examine the defendant.

Essentially the same process that the psychiatrists would utilize if they were serving on a sanity commission was utilized by them in this case. They examined the person whose cognitive abilities at an earlier time were in question - John C. Skannal - reviewed the extensive medical records made available to them, interviewed other witnesses who had long-term contact with Mr. Skannal, interviewed health care providers and care givers, and reached conclusions concerning Mr. Skannal's mental condition and competence at earlier times.

D. Use of the IDEAL Protocol to organize the evaluations.

The findings of fact, diagnoses and conclusions of the Plaintiff's expert medical witnesses have been organized utilizing a protocol developed by Dr. Bennett Blum, a forensic and geriatric psychiatrist who is a nationally-recognized authority in the area of undue influence and **elder financial abuse**. The protocol utilizes an acronym, “IDEAL” to assist evaluators in organizing the various factors that should be reviewed in any case in which allegations of undue influence are made. The letters of the protocol acronym stand for:

*I*solation

*D*ependency

*E*motional manipulation and/or Exploitation

*A*cquiescence and

*L*oss

As will be testified to by Plaintiff's expert witnesses at the hearing on this motion, they have analyzed the factors they discovered in their examination of Mr. Skannal and in their investigation and considered how each of them has affected one or more of the IDEAL protocol factors. Collection of those various factors has created an analytical database which they have considered in reaching their opinions concerning whether or not Dennis and Margie Bamburg unduly influenced John C. Skannal in entering the various transactions that have been challenged.

The IDEAL Protocol is included in the most authoritative textbook on psychiatry currently in use by medical schools in the United States, Kaplan & Sadock's, *Comprehensive Textbook of Psychiatry* (Lippincott, Williams & Wilkins, Eighth Edition, 2005), as Chapter 51.5b, pages 3797-3805. A copy of that chapter is attached hereto as Exhibit B. As Dr. Blum explains in the textbook, IDEAL is not anything revolutionary or unique. It is simply an analytical framework within which to list and consider various factors that are known to be present and pertinent in undue influence investigations.

III.

CONCLUSION

For the foregoing reasons, Plaintiff shows that the expert medical witnesses that will be called both at the *Daubert* hearing and at trial on behalf of the Plaintiff have each utilized time-tested, peer reviewed, validity-tested methods of forensic medical examination and evaluation that have been in common usage in the medical fields for decades. Their testimony on these medical matters will greatly aid the trier of fact in understanding the evidence and determining certain critical facts at issue (the mental capacity of John C. Skannal and whether or not he was unduly influenced by the Defendants). Pursuant to [La. Code of Evid. art. 702](#), their testimony should be admitted at trial and the Defendants' Motion *in Limine* should be denied.

Footnotes

- 1 The appellate court in *Bethley* noted that no decision had been rendered by the Louisiana Supreme Court even though the writ had been granted in 1998. Undersigned counsel represents to this Court that counsel for the writ applicant in *Succession of Reeves*, with whom undersigned counsel corresponded, indicated that the case settled on the morning of oral argument and there never was a decision rendered by the Supreme Court.
- 2 Dr. Seiden's testimony concerning a psychological autopsy on a deceased smoker was upheld as admissible by the Supreme Court of Mississippi in *Nunnally v. R. J. Reynolds Tobacco Company*, 869 So. 2d 373 (Miss. 2004). A copy of the *Nunnally* decision is attached hereto as Exhibit A.
- 3 The Court should note that the only medical expert witness identified by the Defendants, Dr. James Phillips, never examined Mr. Skannal. In his work on the case, Dr. Phillips only reviewed Mr. Skannal's medical records and interviewed Dennis and Margie Bamburg, the very people who are accused of having unduly influenced John C. Skannal into signing the challenged documents.